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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections 3(n)) GN Docket No. 93-252
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)

To: The Commission

**REPLY COMMENTS
OF THE
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.**

Respectfully submitted,

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SUMMARY

The National Association of Business and Educational Radio, Inc. ("NABER") respectfully submits its Reply Comments in response to the Comments filed in the above-captioned proceeding.

As detailed in NABER's initial Comments, as well as the Comments filed by Nextel Communications, Inc. ("Nextel"), the limited amount of spectrum available to SMR systems and the intense geographic sharing of spectrum in the band will preclude an apples-to-apples comparison with cellular systems and such systems are not "substantially similar". In such an area, the wide-area SMR licensee may not have enough spectrum to be able to use cellular type transmitter sites, and may instead need to utilize a "macro" site. Thus, imposition of an arbitrary power and height limitation would limit the operator's ability to compete.

For SMR operators, NABER opposes making the move from 861/865 MHz to 856/860 MHz mandatory, as proposed by Nextel. Such a requirement would only prevent **existing, analog** licensees from combining and converting to wide-area operation. NABER recognizes that in many large urban areas, there may not be sufficient spectrum for all transmitter-site 861/865 MHz licensees to relocate to 856/860 MHz.

Under NABER's proposal, traditional analog SMR licensees would be able to obtain their own service-area license if they can clear off one or more channels and regardless of whether they wish to convert to digital. Thus, NABER's proposal permits more licensees to obtain the type of wide-area authorizations currently enjoyed

by Nextel and others. NABER believes that its proposal is of significant benefit to the small SMR operator. It also helps to stem the flow of some of the "application mill" filings and will eventually reduce or eliminate waiting lists in many secondary markets.

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AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER") by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, respectfully submits its Comments in response to the Comments submitted by various parties in the above-captioned proceeding.

I. BACKGROUND

In its initial Comments, NABER recommended that to the extent that new rules and limitations are placed on Part 90 licensees, implementation of such rules and limitations be delayed until the end of the transition period. The Commission's proposals in this and other proceedings will fundamentally change the vast majority of the Commission's Part 90 rules, where there are currently more than one million licenses, and education of the new rules will be paramount for all Part 90 licensees.

NABER urged the Commission to promulgate the least restrictive rules necessary. Regulations should only ensure a level playing

field among applicants and prevent interference between systems. Where current rules do not accomplish these goals, NABER recommended that the Commission eliminate them.

For Part 22 paging systems, NABER recommended several changes which would improve speed of service for license grants for the band. Additionally, NABER requested that it be designated as the Commission's frequency advisory committee for the Part 22 paging channels. NABER stated its belief that it can bring the same benefits to licensees in the Part 22 services as it has to the 929 MHz PCP licenses.

NABER opposed the Commission's spectrum cap proposal. Although NABER supported a limit on the amount of spectrum assigned to a single entity in any allocation of new spectrum, NABER stated its belief that a spectrum cap in a mature market thwarts the marketplace forces which have led to a competitive wireless communications infrastructure.

NABER supported the continued use of first-come, first-serve procedures for Part 90 applications to the maximum extent possible. NABER recommended that the Commission permit mutually exclusive applications within thirty (30) days for the 861/865 service-area based licensing band, while retaining first-come, first-serve procedures for 851/860 MHz applications.

NABER also provided its view of the manner in which service-area based licensing for 800 MHz systems could occur. NABER endorsed the Commission's proposed concept for 900 MHz licensees and suggested that Major Trading Areas ("MTAs") most satisfy the

needs of SMR service providers to serve business customers seeking dispatch service.

Since the issues involved in this proceeding are extremely complex, NABER recommended that the Commission decide now only those issues which must be decided now. Complex licensing issues which can be resolved in a continuation of this proceeding should wait for a complete analysis, instead of a rush decision that results in numerous petitions for reconsideration. Further, NABER recommended that to the extent that new rules and limitations are placed on Part 90 licensees, implementation of such rules and limitations be delayed until the end of the transition period. The Commission's proposals in this and related proceedings (e.g., MD Docket No. 94-19 (Regulatory Fees) and PR Docket No. 92-235 (Part 90 Refarming)) fundamentally change the vast majority of the Commission's Part 90 rules, where there are currently more than one million licenses. Such rules and limitations should not be phased in over time, as this will only create further confusion. Therefore, NABER recommended two rule change periods, one on August 10, 1994 and one at the end of the transition period in 1996.

Many of the initial Comments filed in this proceeding echo NABER's concern regarding the short time parties were required to submit Comments. Few of the Comments reviewed by NABER present any in depth analysis of the impact of the rule changes proposed by the Commission. NABER agrees with U S WEST, Inc. ("U S WEST"), that overhauling the technical rule requirements at this time "... is far too complex to be undertaken within the accelerated time frame

in which this proceeding is being conducted."¹ For example, few Commentors submitted any analysis of the proposed FCC Form 600. McCaw Cellular Communications, Inc. ("McCaw") urged the Commission to defer action on the form, as the form "... has not received the review and analysis required to assess any potential problems with its preparation and processing in a range of services."² The Personal Communications Industry Association ("PCIA") requested that the Commission delay implementation of the form until such time as "... potential applicants can be educated about its use."³ NABER concurs with this analysis and hopes that the Commission will heed the request of Commentors such as PCC Management Corp. ("PCC") and Geotek Communications, Inc. ("Geotek") to defer the implementation of the technical rules changes in this proceeding.

II. REPLY COMMENTS

A. "Substantially Similar" Services And Licensing History

Significant controversy in this proceeding revolves around opinions regarding whether Enhanced Specialized Mobile Radio Systems ("ESMR") are "substantially similar" to Part 22 cellular systems and PCS systems. In its initial Comments, NABER pointed out its view that the two services are not "substantially similar" for numerous reasons.

Not surprisingly, most of the comments stating that ESMR systems are "substantially similar" to Part 22 cellular systems

¹Comments of U S WEST at 6.

²Comments of McCaw at 32.

³PCIA Comments at 24.

were filed by cellular providers.⁴ One commenter, New Par, even goes as far as to claim that cellular, mobile satellite service, interconnected SMR (both wide-area and non-wide-area), interconnected business radio service and two-way 220-222 MHz services are substantially similar. According to New Par, "[f]actors such as current channel capacity, technical quality, or geographic range of SMR and other would-be cellular competitors should not be considered."⁵ E. F. Johnson Company ("Johnson") also claims that wide-area SMR systems are substantially similar to cellular.⁶

Although several commenters claim that ESMR systems are "substantially similar" to Part 22 cellular systems, they provide no analysis of what "substantially similar" means in the context of this proceeding, other than offering conclusory statements that, since the services are substantially similar, they therefore must have the same technical rules (e.g. antenna height and power).

As detailed in NABER's initial Comments, as well as the Comments filed by Nextel Communications, Inc. ("Nextel"), the limited amount of spectrum available to SMR systems and the intense geographic sharing of spectrum in the band will preclude an apples-to-apples comparison with cellular systems.⁷ Although some wide-

⁴See, for example, the Comments of U S WEST at 3; McCaw at 22; Vanguard Cellular Systems, Inc. ("Vanguard") at 5.

⁵Comments of New Par at 4.

⁶Comments of Johnson at 4.

⁷Comments of Nextel at 28.

area SMR systems have been able to assemble spectrum over a wider geographic area than a typical cellular system, the lack of available spectrum still limits the SMR service.

Another failing of some of the Comments that believe that the two services are substantially similar, is the apparent belief that all ESMR Systems are (or will be) Motorola MIRS Systems intending to provide cellular substitute services to the general public. Geotek Comments demonstrate that all ESMRs are not the same.⁸ Similarly, an ESMR grant to Racom Corp. in the Mid-West portion of the country is proposed to be constructed with Ericsson-GE's "EDACS" equipment primarily as an extension of its current dispatch offering. Pending ESMR requests filed by Parkinson Electronics Company and Speed-Net do not currently propose MIRS equipment.

The Comments that support classifying wide-area SMR systems as substantially similar to cellular systems totally ignore the disparate licensing environment of the two services. Instead, there is a knee-jerk reaction that "similar" means "same". It appears that many of the comments that request equalization of technical rules between the services are based upon an unfamiliarity with the SMR service. For example, New Par provides no rationale for requiring all SMR systems (regardless of whether they are single-site or wide-area systems) to conform to Part 22 height and power rules. New Par suggests that this will benefit the SMR service by reducing interference.⁹ However, by reducing

⁸Comments of Geotek at 3-4.

⁹New Par Comments at 7-8.

power, single-site SMR systems would lose coverage. New Par may be unaware that, even if the licensee could economically justify having to build another transmitter site, the licensee would probably be unable to license another site because of short-spacing to unaffiliated co-channel licensees.

In contrast, PCIA believes that the two services are substantially similar,¹⁰ but claims that different technical requirements may nevertheless be required.¹¹ American Personal Communications also recognizes the differences and states that power and height requirements may need to be different in similar services.¹²

As explained in NABER's initial Comments, a wide-area SMR system may be limited in the number of frequencies available at a particular geographic area, due to co-channelling by unaffiliated systems. In such an area, the wide-area SMR licensee may not have enough spectrum to be able to use cellular type transmitter sites, and may instead need to utilize a "macro" site. A cellular system would not be faced with this type of limitation. Thus, imposition of an arbitrary power and height limitation would limit the operator's ability to compete.

¹⁰PCIA Comments at 5.

¹¹PCIA Comments at 6-7.

¹²See, Comments of American Personal Communications ("APC") at 4.

B. Technical Rules

1. Channel Assignment and Service Area - 800 MHz

In its initial Comments, NABER stated that it had reviewed a draft of a service-area licensing proposal by Nextel. NABER stated that it generally supported the concept of service-area licensing (just as NABER had supported the Commission's attempts to achieve service-area licensing in PR Docket No. 93-144). NABER's Comments presented a concept of how a service-area licensing plan could work.¹³

NABER's proposal, as presented in its initial Comments, is **voluntary**, and is based upon a wide-area applicant **giving up** 856/860 MHz spectrum. In its Comments, NABER supported a service-area based license for **any** SMR licensee (regardless of whether the licensee is implementing a digital system or wishes to remain an analog operator) who could clear off a channel. A service area license would allow existing SMR systems to expand or at the very least avoid being surrounded at close distances by other carriers. NABER does not believe that the Nextel proposal (as it was originally drafted nor as expressed in its Comments) would serve the goals of the SMR industry in general.

NABER's Comments propose that the Commission permit service-area based licensing for only the 861/865 MHz portion of the SMR

¹³Unfortunately, some operators or their representatives have misunderstood NABER's Comments to be an endorsement of Nextel's mandatory relocation plan. However, as explained in NABER's initial Comments and these Reply Comments, NABER does not support a mandatory plan of relocation which would not permit all SMR operators to acquire service-area licenses.

Pool. Licenses would be awarded for a Commission defined service area (i.e. BTA/MTA). If an applicant wanted a service area license, the applicant would be required to move all non-affiliated licensees in the service area on the requested frequencies to the 856/860 MHz portion of the SMR Pool at the wide-area applicant's cost. The wide-area licensee would give up some of its 856/860 MHz spectrum to accommodate the relocated licensee. All new licensing by the Commission would be service-area based in the 861/865 MHz band, and transmitter-based for the rest of the 800 MHz band.

861/865 MHz licensees would **not** be required to move under NABER's proposal, and would be grandfathered for their existing authorizations. Any move would be voluntary. Modifications would be limited by the MTA/BTA boundaries of surrounding service-area based licensees. There would be incentives for some transmitter-based licensees to move. Many transmitter-based licensees are surrounded by an ESMR licensee at very short co-channel spacings which were obtained under the Commission's former "short-spacing" rules. By moving to a 856/860 MHz frequency which is surrendered by the ESMR, the licensee would no longer be a high-powered "island" surrounded by low-power stations. All further short-spacing on the 856/860 MHz spectrum would be under the Commission's new short-spacing table, which would give the relocated licensee much more protection and flexibility. Further, the "changeout"

would help minimize adjacent channel interference which has been discussed as a potential problem with digital equipment.¹⁴

NABER stated that it is important that the Commission permit new service-area based licensees in the 861/865 MHz band to the extent that spectrum remains available. This would allow existing transmitter-based licensees that do not currently have wide-area licenses to combine with other licensees on the same frequencies to create wide-area systems. NABER stated it would oppose a limit on the maximum or minimum number of channels for which a service-area based licensee could obtain a license. Instead, NABER believes the marketplace should dictate whether it is feasible for existing licensees to negotiate the creation of wide-area systems.

NABER opposes making the move from 861/865 MHz to 856/860 MHz mandatory, as proposed by Nextel. Such a requirement would only prevent **existing, analog** licensees from combining and converting to wide-area operation. NABER recognizes that in many large urban areas, there may not even be sufficient spectrum for all transmitter-site 861/865 MHz licensees to relocate to 856/860 MHz. This is one of the reasons why the plan must be voluntary. In addition, where there are three licensees on a particular frequency, two of which have been granted wide-area licenses, mandatory movement would also cause needless mutual exclusivity situations.

¹⁴This proposal is similar to NABER's recommendation in the Part 90 "Refarming" proceeding ("PR Docket No. 91-170). In that proceeding, NABER stated that a licensee should be permitted to buy out or move co-channel licensees in order to achieve exclusivity.

Under NABER's proposal, traditional analog SMR licensees would be able to obtain their own service-area license if they can clear off one or more channels regardless of whether they wish to convert to digital. Thus, NABER's proposal permits more licensees to obtain the type of wide-area authorizations currently enjoyed by Nextel and others. NABER believes that its proposal is of significant benefit to the small SMR operator. It also helps to stem the flow of some of the "application mill" filings and should eventually reduce or eliminate waiting lists in many secondary markets.¹⁵

A mandatory relocation program as presented by Nextel is not workable in the 800 MHz service. There are many reasons why a licensee may not be able to relocate. For example, a large number of SMR systems have customers who utilize older E. F. Johnson LTR or General Electric radios, which represent a significant portion

¹⁵A suggestion in NABER's initial Comments regarding license renewal expectancy may have led to confusion about NABER's position on the issue. NABER stated that there may be rare situations where a transmitter based licensee refuses to agree to a move from 861/865 MHz frequencies to 856/860 MHz frequencies, despite the presence of sufficient spectrum and the sincere efforts of a wide-area licensee(s) in the area. NABER suggested that the Commission may take such considerations into account at the ten year renewal. Some readers may have taken this to indicate that NABER really supports a mandatory relocation, as a license would have to move at renewal time. However, this is not NABER's position. Rather, NABER's suggestion presented a rare scenario whereby the Commission could consider the refusal to relocate after the Commission decided that the licensee was not entitled to license renewal expectancy in the two step process used for cellular licensees. Thus, the hurdle would be extremely high, as the failure to relocate would only be considered after the Commission decides that the licensee is not entitled to a renewal expectancy. In fact, as explained herein, there are legitimate reasons why some licensees may elect not to move, and such licensees should have their licenses renewed.

of the system's customer base. Many older radios cannot be re-tuned to operate in the 856/860 MHz band, while others can only function in one of the two bands. In some urban areas, there simply isn't enough spectrum to relocate all of the systems which would need to be relocated under Nextel's proposal. There is no compelling reason to disenfranchise such operators because Nextel or some other ESMR operator is having difficulty delivering on its promise to the Commission and the SMR industry to construct a digital SMR system without causing interference to co-channel systems.

2. Part 22 Paging Services

In its initial Comments, NABER recommended several changes which would improve speed of service for license grants for the band. NABER requested that it be designated as the Commission's frequency advisory committee for the Part 22 paging channels.¹⁶ NABER offered to bring the same benefits to licensees in the Part 22 services as it has to the 929 MHz PCP licenses. NABER expects that the Commission's speed of service could be brought to the lowest levels possible, with fewer disputes among applicants, if coordination is required.¹⁷

¹⁶NABER would not object to a competitive coordination environment to offer this service whereby other representative organizations also coordinate the band, provided sufficient notification procedures are in place to prevent duplicate recommendations.

¹⁷At the very least, the Commission should closely examine the benefits of the Part 90 application process.

Pagemart, Inc. ("Pagemart") recognizes the benefits which NABER has brought to 929 MHz PCP frequencies.¹⁸ Paging Network, Inc. ("Pagenet") also recognizes NABER's efforts, and recommends that the Commission utilize frequency coordination for the 931 MHz RCC paging frequencies.¹⁹ PCIA recommends that the Commission utilize frequency coordination for all Part 22 frequencies.²⁰ This support for Part 90 coordination procedures should convince the Commission that the value of coordination can aid the Commission in its processing of Part 22 applications.

Some comments in this proceeding support using first-come, first-serve application procedures for Part 22 applications.²¹ Should the Commission elect to use first-come, first-serve application procedures for Part 22 applications, NABER believes that frequency coordination can operate in the same manner as current Part 90 coordination, with applications being placed on Public Notice when received by the Commission after certification from the frequency advisory committee.

Should the Commission instead elect to utilize a procedure by which mutually exclusive applications can be filed after the initial application has been placed on Public Notice, NABER

¹⁸See, Comments of Pagemart at 9.

¹⁹Comments of Pagenet at 9.

²⁰See, Comments of PCIA at 26.

²¹See, for example, Comments of Pagenet at 35; GTE Services Corp. at 14.

believes that frequency coordination can work in the following manner:

1. An applicant would submit its application to the Commission, with a copy to the frequency advisory committee;²²

2. The Commission would place the application on Public Notice. While the filing window is open, the frequency advisory committee would review the initial application for accuracy;²³

3. If no competing applications are filed, the frequency advisory committee can immediately recommend a channel. The application can then be rapidly granted by the Commission;

4. If a competing application is received, the frequency advisory committee would review all competing applications filed during the window and determine whether all applications can be accommodated. The frequency advisory committee would coordinate as many of the competing applications as possible;

5. If all competing applications cannot be coordinated, the frequency advisory committee would inform the Commission and provide the Commission with a coordination for a frequency which would satisfy each applicant, but which is mutually exclusive with each other;

²²Alternatively, the frequency advisory committee could download the application information electronically from the Commission.

²³As discussed in NABER's initial Comments, a large portion of applications received by frequency advisory committees for review contain errors. A major function which the frequency advisory committee can perform for the Commission is the correction of such errors, reducing the amount of Commission review for each application (saving the Commission time and money) and reducing the need to return applications.

6. The Commission would conduct lottery or auction proceedings (as appropriate) and award the license;

7. While the Commission is reviewing the applications and conducting the auction/lottery, the frequency advisory committee can coordinate other applications "around" the applications awaiting auction/lottery. In other words, the frequency advisory committee can coordinate other applications as if the applications awaiting auction/lottery had both been granted. In effect, the frequency advisory committee would be protecting a combined service area of the two pending systems.

3. Antenna Height and Transmitter Power Limits

As discussed previously, several cellular companies request that the antenna height and transmitter power limitations between cellular and SMR services be conformed.²⁴ McCaw believes that these technical rules should be conformed "absent any justification".²⁵ NABER believes that its initial Comments aptly demonstrated why the rules cannot be conformed. Geotek, Southern Company and Pittencrief provide additional detail sufficient for the Commission to determine that reducing the antenna height and power limits for Part 90 systems should not be reduced.²⁶ Southwestern Bell at page 11 of its Comments suggests that the Commission raise the height and power limitations for Part 22 services to that of the Part 90

²⁴See, for example, the Comments of New Par at 7; SW Bell at 11; GTE at 12; Nynex at 3.

²⁵Comments of McCaw at 35.

²⁶See, Comments of Geotek at 15; Southern Company at 9-10; Pittencrief at 9.

services. NABER takes no position on this issue as it relates to interference among cellular operators. However, NABER does not object to the proposal as it relates to the Part 90 services.

4. Application and Regulatory Fees

In its initial Comments, NABER stated that although it believes that similarly situated services should be charged the same fee, the Commission should closely review each service and justify the charges based upon the actual services to be performed by the Commission.

CTIA and Bell Atlantic Companies request that the Commission require all CMRS providers to pay the same fees.²⁷ However, PCIA, Pagemart, Celpage, Inc., Metrocall, Inc., Network USA, Inc. and RAM Technologies, Inc. ask that the Commission justify any increased fees.²⁸ Pagemart and PCIA note the cost savings which frequency coordination brings to the Commission's processes and request that the Commission keep fees for coordinated applications at the Part 90 rate.²⁹ Southern Company and RAM Mobile Data USA, L.P. ("RAM") note the different type of licenses which SMR operators receive versus cellular operators.³⁰ Both Southern Company and RAM point out how SMR licensees must obtain licenses for each transmitter site and must file applications for each and every modification.

²⁷Comments of CTIA at 5; Bell Atlantic Companies at 15.

²⁸Comments of PCIA at 29; Pagemart 13; Celpage at 26; Metrocall at 26; Network USA at 26; RAM Technologies at 26.

²⁹Comments of PCIA at 28; Pagemart at 11.

³⁰Comments of Southern Company at 12-13; RAM at 12.

Thus, to charge the Part 22 fee to SMR operators would be inherently unfair.³¹

If parity is what the Commission truly wishes to implement, it must consider the real impact of its proposed rule changes. Equalizing the filing and regulatory fees at this time when the licenses issued are not similar would result in cosmetic parity which in reality would disadvantage Part 90 licensees.

III. CONCLUSION

WHEREFORE, the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.**

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³¹If the Commission were to implement NABER's proposed licensing process for the 861/865 MHz band, fees similar to cellular could be charged for such service-area based licenses.